82-5793



NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JIMMY LEE HORTON

Petitioner,

-v.-

STATE OF GEORGIA

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Hugh C. Wallace
Attorney for Petitioner
103 Fulton Federal Bldg.
544 Mulberry Street
Macon, Georgia 31201
(912) 742-2987

John E. Simmons
Attorney for Petitioner
705 Georgia Power Bldg.
P. O. Box 214
Macon, Georgia 31202 - 0214
(912) 745-3324

## QUESTIONS PRESENTED

1.

Whether the imposition of the death penalty was disproportionate to the sentences imposed in other similar cases in violation of petitioner's Eighth and Fourteenth Amendment rights under the United States Constitution?

2.

Whether petitioner was deprived of having the jury consider a possible mitigating factor in the sentencing phase of the trial in violation of his Eighth and Fourteenth Amendment rights under the United States Constitution?

3.

Whether Georgia Code Ann. § 27-2534.1 (b) (2) is unconstitutional in that same allows a jury to inflict the death penalty under circumstances where a defendant's crime does not reflect consciousness materially more depraved than that of any person guilty of murder in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

4.

Whether the court's charge to the jury at the sentencing phase of the trial failed to guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

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_____ Term, 1982

No. _____

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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Comes now JIMMY LEE HORTON through legal counsel, and files this petition for the Writ of Certiorari to issue to review the judgment of the Supreme Court of Georgia entered September 8, 1982.

CITATION TO OPINION BELOW

A copy of the opinion of the Supreme Court of Georgia, reported at _____Ga. _____, 295 SE2d 281(1982), is attached hereto as Appendix A. Said Court is the highest appellate court of the State of Georgia.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 8, 1982. A motion for a rehearing was denied by the Supreme Court of Georgia on the 28th day of September, 1982, as is reflected at the top of the page, first page, of said attached opinion. There was no order respecting the granting of an extention of time in which to petition for certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), petitioner having asserted in this Court and below deprivation of rights secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

" . . . nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law."

This case also involves Ga. Code Ann. § 27-2534.1 (b) (2), as follows:

"In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(2) . . . the offense of murder was committed while the offender was engaged in the commission of burglary . . ."

This case also involves Ga. Code Ann. § 27-2534.1 (c) in revelant part:

" . . . unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed."

This case also involves Ga. Code Ann. § 27-2511 in relevant part as follows:

" . . . any person who, after having been three times convicted under the laws of this State of felonies, or

under the laws of any other State or of the United States, of crimes which, if committed within this State would be felonies, commits a felony within this State other than a capital felony, must, upnn conviction of such fourth offense, or of subsequent offenses, serve the maximum time provided in the sentence of the jury or the judge based upon such conviction, and shall not be eligible for parole until the maximum sentence has been served . ."

Georgia Code Ann. § 26-1601 provides in relevant part:

" . . A person convicted of burglary shall be punished by imprisonment for not less than one nor more than 20 years."

## STATEMENT OF FACTS

Petitioner, a black man, was tried, convicted and sentenced to death on February 27, 1981 in the Superior Court of Bibb County, Georgia, for the murder of W. Donald Thompson, a white District Attorney for said county.[1] In one indictment,[2] he was charged with murder and two counts of burglary. As to the burglary counts, in conformity with Georgia Code Section 27-2511, petitioner was indicted as an habitual offender. He was convicted by the jury on both burglary counts. In conformity with said code section, the court sentenced petitioner to serve 20 years on each burglary count, said sentences to run consecutively to the death sentence and concurrently with one another (T. 1135, Vol. 5).[3]

(1) The Facts Surrounding the Crime

On November 28, 1980, the petitioner herein, Jimmy Lee Horton, along with Pless Brown, Jr., borrowed a 1976 Ford pick-up truck from Hamp Davis (T. 740).

At approximately 6:30 p.m. on said date, Willie James Griffin left his home in Macon, Georgia to go shopping (T. 553). While he was gone, Horton and Brown entered the Griffin residence and stole his television set. Hamp Davis stayed at

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1 / The victim of the homicide happened to be the District Attorney. He was not the victim because he was the District Attorney.

2 / A copy of the indictment is annexed as Appendix B.

3 / Each reference to the transcript of petitioner's trial in the Superior Court of Bibb County, Georgia, will be indicated by the abbreviation "T.".

the back fence (T. 892) and helped Horton lift the T.V. over the fence (T. 891). While Davis and Horton were carrying the T.V., Brown was inside the house stealing Griffin's pistol and ammunition (T. 890).

Later that evening Horton and Brown sold Griffin's T.V. to Eudell and Horace Graham with the assistance of Ann Davis, the wife of Hamp Davis (T. 585, 595, 891).

At approximately 11:00 p.m. that night, Horton and Brown broke into Sherrel Grant's apartment in a Macon Apartment complex (T. 892). While inside the apartment, Brown discovered Ms. Grant's .22 caliber pistol, and he gave Horton the Griffin pistol (T. 892). While the furniture Brown wanted to steal from Ms Grant's apartment (T. 892) was being moved, Horton and Brown swapped pistols several times (T. 901).

While Horton and Brown were inside the apartment, Ms. Grant and Don Thompson, the District Attorney of this Circuit (T. 551) returned (T. 893, 679). Ms. Grant and Mr. Thompson had been to dinner at a friend's home, and Mr. Thompson had left there the pistol he usually carried (T. 676, 679, 698). Mr. Thompson had been drinking and his blood alcohol level was .19 per cent (T. 695, 870). When they arrived, Ms. Grant noticed her front door was not latched, and looking inside she noticed that some furniture was missing (T. 679). Mr. Thompson went next door, borrowed a pistol and loaded it (T. 679). He then went inside Ms. Grant's apartment (T. 681).

In the meantime, Horton and Brown noticed the arrival of Ms. Grant and Mr. Thompson, and they left the apartment through the rear door (T. 893). The Davis truck was parked at the front of the apartment building, so that both Horton and Brown had to run across the area within the sight of Ms. Grant in order to reach the truck (T. 893, 687). As Horton ran past Ms.

Grant, at a distance of about 55 feet from her (T. 804), he fired three shots in her general direction (T. 893, 689). These shots struck the apartment building approximately 25 feet from where Ms. Grant was standing (T. 802, 810). Horton testified he used Ms. Grant's silver pistol when he fired those shots (T. 893), while Ms. Grant testified he used a black pistol like the one stolen from Willie James Griffin's house (T. 687). However, Ms. Grant at trial also identified a silver automatic pistol as the one which Horton used (T. 681). The bullets which struck the apartment building were recovered and identified as having been manufactured by Remington (T. 866).

Testimony regarding the sequence of the shots that followed varied from witness to witness. One theory presented by the evidence is that at about the time Horton and Brown reached the truck, Ms. Grant was pulled into a neighbor's apartment (T. 716, 619, 897). Horton testified that Brown fired this second volley while leaning out of the passenger side door of the truck (T. 897, 898, 899). All witnesses who saw the pair with the truck that night testified Horton was the driver and Brown was the passenger (T. 565, 587, 598, 683, 740). Horton's testimony was supported by resident manager Carol Baker who saw four shots fired from the passenger side of the truck just before it pulled away (T. 718).

Mr. Thompson was found in the rear of the apartment building (T. 611, 693, 721). He had been struck by a single .22 caliber bullet and the bleeding from his wounds resulted in his death. (T. 831).

Horton's testimony added a second theory. He testified Brown shot Mr. Thompson at the rear of the apartment near where the body was found (T. 897.) Medical testimony indicated

it was possible for a person who had sustained the wounds sustained by Mr. Thompson to have either fallen where he was shot or to have run from the corner of the building to the place where his body was found (T. 833, 840).

Following the second volley of shots, the truck drove away from the scene. Horton and Brown returned to Horton's residence where Brown decided to take the silver pistol belonging to Ms. Grant and leave the black pistol belonging to Willie James Griffin with Horton (T. 900).

The truck was eventually traced to Hamp Davis who was questioned on December 15 and 16, 1980 from 4:45 p.m. until 4:00 a.m. After he had been questioned for 7 to 8 hours, and he had been led to believe the police would try to pin the homicide on his brothers, Davis told the police Horton and Brown had borrowed the truck, and Horton had admitted the offense of murder (T. 742, 753). Horton denied having this conversation with Davis (T. 903), and he also denied shooting Mr. Thompson (T. 904).

Based on the information given by Davis, Horton was arrested on December 16, 1980. Subsequently, the Griffin pistol was discovered in Horton's bedroom by Officer Janice Gordon (T. 787). This pistol was identified as the one which fired the bullet which killed Mr. Thompson (T. 854). This bullet was a CCI brand (T. 863).

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The issues raised in Questions I and II herein were raised at the trial in the court below. The same issues were again raised in the trial court by an amended motion for a new trial, the same having been overruled. By proper appellate procedure these issues were reasserted in the Georgia Supreme Court. These issues were there rejected.

The issues contained in Questions III and IV of this petition, though not raised in the lower court, were presented to the Supreme Court of Georgia, that court deciding those issues on their merits against petitioner.

Question I of this petition was addressed by the Georgia Supreme Court in divisions 13 and 14 of the attached opinion, while Question II was addressed in division 4 of said opinion. Question III was addressed in division 12 and Question IV was dealt with in division 8 thereof.

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF THE DEATH PENALTY WAS DISPROPORTIONATE TO THE SENTENCES IMPOSED IN OTHER SIMILAR CASES IN VIOLATION OF PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Under the Georgia capital punishment statute (Ga. Code Ann. § 27-2534.1 (c)) at least one aggravating circumstance must be found by the jury before a death sentence is authorized. Here, the jury found the existence of only one aggravating circumstance (Ga. Code Ann. § 27-2534.1 (b)(2)):

> "The offense of murder . . . was committed while the offender was engaged in the commission of burglary.. "

Furman v. Georgia, 408 U.S. 238 (1972) teaches us a death sentence cannot be imposed in an arbitrary or capricious manner. Gregg v. Georgia, 428 U.S. 153 at 158 tell us the death penalty is an extreme sanction, suitable to the most extreme of crimes.

Gregg, supra, at page 198, points out as a safeguard against arbitrariness and caprice, the Georgia statutory scheme, among other things, requires the Georgia Supreme Court to determine whether the sentence is disproportionate to those sentences imposed in similar cases.

The facts of this case are not so extreme as to warrant the death penalty, and the imposition of the death penalty is disproportionate to the sentences generally imposed in other similar cases. The contention here is there simply is not enough aggravation in the matter to elevate the situation to a death penalty level.

On the last page of the attached opinion, the Georgia Supreme Court in an Appendix lists five comparison cases as a basis for upholding this death sentence. Petitioner con-

tends each of those cases involve a crime that reflects consciousness materially more depraved than that reflected here. Not one case cited by the Supreme Court of Georgia makes for meaningful and realistic comparison.

The first case the Georgia Supreme Court cited in comparison is Bowden v. State, 239 Ga. 821, 238 SE2d 905 (1977). The opinion in that case states:

> "The evidence showed a planned invasion of the home of the victim and her elderly mother, conceived by appellant and his juvenile companion while in their employ. The two entered the victim's home armed with a pellet gun 'to knock anyone out who might interfere' and Bowden viciously beat and stabbed Mrs. Stryker to death and beat her invalid mother so badly the injuries were evident for weeks afterward."

The language last quoted negates a comparison.

The next case cited is Stephens v. State, 237 Ga. 259, 227 SE2d 261 (1976). That case does not present a factual situation which would be the basis for a meaningful comparison. There, Stephens was burglarizing a house. The victim, a cripple and seven inches shorter than defendant, drove up in his auto and was snatched therefrom by defendant. Defendant proceeded to strike him in the face several times. The victim begged defendant not to hit him again and offered him money in exchange for his life. Defendant took the money then kicked the victim. Stephens then hit the victim with a pistol, kidnapped him and drove to a pasture. The victim tried to escape by hobbling away, but was chased down and robbed. Stephens then stuck the gun in the victim's ear and fired twice, killing him.

The third case cited by the Georgia Supreme Court was Moore v. State, 233 Ga. 861, 213 SE2d 829 (1975). In that case defendant and George Curtis planned to take the money of Fredger Stapleton, then burn the fellow up in his room. Moore, in the late evening, entered Stapleton's home through the window, suprising Stapleton. Inside, a shootout followed in which the victim was shot twice in the chest. After shooting him, Moore took two billfolds from his pockets and carried away his shotgun.

We note here that in Moore v. Balkcom, 513 F. Supp. 803 - 818 (federal habeas) this death sentence was vacated and remanded back to the Superior Court, that Court saying:

> "The Court quickly determines that 'petitioner's crimes cannot be said to have reflected consciousness materially more 'depraved' than that of any person guilty of murder.' 446 U.S., at 432 - 33. The petitioner's case is thus held to be indistinguishable from the many cases in which the death penalty was not imposed. Accordingly, his death sentence is reversed."

As a comparison case, the Georgia Supreme Court also cited Callahan v. State, 229 Ga. 737, 194 SE2d 431 (1971). The opinion in that case states:

> "There was testimony that the victim, a young, inexperienced police officer, responded to a burglar alarm; that upon apprehending two men, one the appellant, he was disarmed and thrown to the ground; that both men violently and repeatedly stomped him unconscious; and that the appellant then pointed the pistol in the victim's face and fired it three times. The victim died several hours later."

Callahan seems to be endowed with acts of extreme cruelty not present in the case at bar.

The final case cited by the Georgia court for comparison purposes was Pass v. State, 227 Ga. 730, 182 SE2d 779 (1971) wherein defendant was convicted of two counts of murder and sentenced to death. The opinion itself does not seem to set out the facts of the case with any specificity. However, the case of Moore v. Balkcom, 513 F. Supp. at 815 purports to give a factual synopsis of Pass, wherein the following language is found:

> "The defendant broke into a home and ransacked it, stealing a variety of items. The defendant was suprised by the residents in the midst of his crime. Both the victims, husband and wife, were found shot through the head. The husband's head was lacerated, apparently as a result of having been beaten with a baseball bat which was found nearby."

This double murder situation seems to have a horror factor unpresent in the case at hand. To make comparison here would be unrealistic.

The cases listed next below are burglary-murder type situations wherein adult defendants were given life sentences.

Smith v. State, 245 Ga. 168, 263 SE2d 910 (1980)

Bryant v. State, 236 Ga. 790, 225 SE2d 309 (1976)

Burke v. State, 248 Ga. 124, 281 SE2d 607 (1981)

In Smith v. State, supra, 245 Ga. 168, it seems a special deputy sheriff stopped his vehicle to investigate a burglary in progress at a residence. The defendant, one of the burglars, got in a tussle with the deputy. The deputy then attempted to get his rifle from his car, but the defendant got it and killed the deputy. A life sentence was given.

In Bryant v. State, supra, 236 Ga. 790, the defendant cut his way into a house with a knife. One of the occupants, a seventy-two year old man, and defendant began to scuffle,

the defendant cutting him with a knife more than once. The scuffle led out to the front porch where the defendant axed the fellow to death. He was given a life sentence on the murder.

In Burke v. State, supra, 248 Ga. 124, two men investigating a burglary in progress at the home of a neighbor got into a shoot out with the burglars. Both men investigating the burglary were shot, one fatally. The defendant received a life sentence for felony-murder.

The most similar case to the case at bar is that of the co-defendant, Pless Brown, Jr. He received a life sentence after being convicted of murder. We respectfully contend there is no material distinction between petitioner's case and that of his co-defendant.

The evidence showed that Horton and Brown were burglarizing Sherell Grant's apartment when she and Mr. Thompson returned (T. 893, 678). Both Horton and Brown were apparently armed, one with a silver pistol and the other with a black pistol (T. 892). Horton and Brown left the apartment through the rear door (T. 893) while Mr. Thompson borrowed a pistol (T. 679) and pursued them (T. 681). After several shots were fired, Mr. Thompson's body was found at the rear of the apartments (T. 833, 840).

The only direct evidence as to who may have fired the fatal shot came from the testimony of Carol Baker and Jimmy Horton. Ms. Baker said that she saw four shots fired from the passenger side of the truck in the direction of Mr. Thompson (T. 718). Brown was the passenger in the truck (T. 565, 587, 598, 683, 740). Horton testified he did not shoot Mr. Thompson (T. 904).

The evidence indicating that Horton fired the fatal shot was Ms. Grant's testimony that he was armed with the

black gun (T. 687), and the opinion of the Crime Lab expert that the black pistol found at Horton's house had fired the fatal shot (t. 854).

Thus, there is evidence which could indicate both Brown and Horton fired at Mr. Thompson, that Brown's shots happened to miss while one of Horton's shots struck the victim. The state argued this very position in Brown's trial (T. 55, Transcript of Closing Argument, State v. Pless Brown, Jr. Argument for the state by Mr. Briley):

> "Mr. Brown fired on him. That's where those four shots came from. And, ladies and gentlemen, that wouldn't require that he shoot through a car. Not at all. And if he's aiming the gun at that time of the night he's going to throw it up like that which would take it upon in the plain sight of anybody across the street. Look at that. He ran for those hedges back there. He ran to those hedges very easily. He fired at him. And when he fired at him Horton turned around and fired at him. They were both firing at him. Yes, I think Horton's gun killed him. I think Horton's bullet killed him. I think Horton's bullet killed him. But I think Horton turned and fired on him becauuse Brown was firing at him. I ask you does that make Brown any less guilty than Horton? Maybe he'd have gone on and got in the truck and driven off. Maybe they'd been caught for Burglary. But there wouldn't have been a man dead."

And Mr. Sparks argued for the state as follows (T. 30, 31, Transcript of Closing Argument, State v. Pless Brown, Jr.):

> "Now, in this case as you know--I'm going to make this brief comment on the facts. No one knows for sure who was--who had this gun in his hand and who

pointed it at Don Thompson and who pulled the trigger and sent that bullet coursing through his arm, his heart, his lungs or his aorta. In other words, the State had no eyewitness who could say, 'I saw Brown or I saw Horton level that gun at Thompson and shoot and I saw Thompson fall.' We do know that both of them were there. And we do know that Don Thompson was shot and we know that he was shot when he went out and tried to apprehend the burglars."

And finally, during the penalty phase of the trial, Mr. Briley for the state argued (T. 97, Transcript of Closing Argument, State v. Pless Brown, Jr.):

"Jimmy Lee Horton had his back to Mr. Thompson. He had done his shooting at Miss Grant. He had his back to Mr. Thompson. He was heading for that truck. He was heading for that truck. And then all of a sudden, POW, POW, POW, POW. And Jimmy Lee Horton whirls around and he fires too. You know, I think they got rid of the gun that fired the most shots in his direction. I really don't think either one of them knew who had killed Mr. Thompson. But the defendant over here, who sayd that he was in the truck when the shooting occurred, told you, 'Mr. Thompson looked at me and told me, hold it, freeze, hold it."

* * * *

As we understand the development of the capital punishment laws, the death penalty is reserved for those murders which have been characterized as "extreme cases" of "outrageous cases."

Gregg v. Georgia, 428 U.S. 153 at 184:

"Indeed, the decision that capital punishment may be

> the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

We respectfully say this case does not rise to that level.

## II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DEPRIVED OF HAVING THE JURY CONSIDER A POSSIBLE MITIGATING FACTOR IN THE SENTENCING PHASE OF THE TRIAL IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

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In one indictment, petitioner was indicted for murder and two counts of burglary. As to the burglary counts, in conformity with Georgia Code Section 27-2511, the petitioner was indicted as an habitual offender, the indictment alleging three prior felonies. The petitioner was convicted by the jury on both burglary counts of the indictment. His prior record was introduced in evidence, the same consisting of more than three prior felonies (T. 1064, 1065, Vol. 5).

In compliance with said code section 27-2511, the court sentenced petitioner to serve 20 years on each burglary count, said sentences to run consecutively to the death sentence and concurrently with one another (T. 1135, Vol 5).

The lower court erred in refusing to permit counsel for the defendant in the sentencing stage to argue to the jury that the court had no other choice but to sentence petitioner to twenty years in the penitentiary, without parole, on a burglary conviction since he had been indicted and convicted as an habitual offender. Petitioner contends the error was harmful for the reason it deprived him of having the jury consider this circumstance of the case as a possible mitigating factor, the same being in violation of his 8th Amendment rights under the Constitution of the United States and his due process rights under the Fourteenth Amendment to the United States Constitution.

During the argument by defense counsel, the following

transpired (T. 1101, line 10 - 1103, line 6, Vol. 5):

"All right. You have found him guilty of murder. You have found him guilty of a second burglary. You see there? These things Mr. Briley has been flaunting around here? The convictions, his prior record, these are his. He has been indicted on the burglary counts as being a habitual violator.

MR. BRILEY: Your Honor, I don't believe that's in evidence at this time.

MR. WALLACE: Your Honor please, may I respond?

THE COURT: Yes, sir.

MR. WALLACE: I am, under the law, I am authorized to argue anything that this jury might think is in mitigation. And under the law, the Court has no other alternative --

MR. BRILEY: Your Honor, if he's going to argue it before the jury, there's no point in my objecting to it.

THE COURT: All right. Approach the bench.

(Whereupon, counsel approach the bench.)

MR. WALLACE: Judge, case, after case, after case I read about, the jury want to know if he's going to be able to make parole. We are not authorized to argue the fact that people do make parole, which Joe got mighty close to violating; but they would be authorized to know he would not be paroled in 20 years, because you can't do it under the law.

MR. BRILEY: Your Honor, that is true. But then on the other hand, the Department of Corrections is going to turn him loose when he's served half his sentence.

MR. WALLACE: No, he can't comment on that. But I can comment on this because it's in mitigation, Judge.

You will be making a bad mistake if you don't let me do this.

MR. BRILEY: Not so, not so. Case after case has held neither side has a right to argue that.

THE COURT: I don't think, Mr. Wallace, that you can argue the future disposition of cases.

MR. BRILEY: No sir, he can't. Neither of us can.

MR. WALLACE: Judge, please. You have no alternative but to send a man to 20 years for burglary without parole.

THE COURT: The jury is not concerned with the effect.

MR. WALLACE: But, Judge, please; it's in mitigation, that is in mitigation.

MR. BRILEY: It's not in evidence.

THE COURT: It's not mitigation of the crime.

MR. WALLACE: It don't have to be in mitigation of the crime, Judge. The fact that he was a Sunday School boy might be admissible. That doesn't mitigate the crime.

THE COURT: No, I don't think this can be argued. I sustain the State's objection.

The mandatory sentences required by law on the burglary convictions, along with its lack of parole feature, could well be considered by a juror as a mitigating factor upon which to base a sentence less then death.

In the following death cases in Georgia, during deliberations, the jury made inquiry as to parole elegibility which could well mean if they had known the defendant would not have received parole for a certain length of time, they perhaps would have given a life rather than death sentence. A knowledge of a lack of parole, it seems, would have entered into their thought process in sentence determination. Those

cases are as follows: McGruder v. State, 213 Ga. 259, 265 (7), 98 SE2d 564; Thomas v. State, 240 Ga. 393 (6), 242 SE2d 1; Tucker v. State, 244 Ga. 721 (11), 261 SE2d 635; Corn v. State, 240 Ga. 130, 240 SE2d 694, Willis v. State, 243 Ga. 185 (16), 253 SE2d 70; Greene v. State, 246 Ga. 598, 272 SE2d 475; and Strickland v. State, 247 Ga. 219 (27), 275 SE2d 29.

On the subject of mitigating factors in death penalty cases see Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954:

> " . . . we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis by Court) . . . .
>
> "In upholding the Georgia statute in Gregg, Justices STEWART, POWELL, and STEVENS noted that the statute permitted the jury 'to consider any aggravating or mitigating circumstances,' see Gregg, 428 U.S. at 206, 96 S. Ct., at 2941, and that the Georgia Supreme Court had approved open and far-ranging argument' in presentence hearings ..."

Also see Gregg v. Georgia, 428 U.S. 153 at 203, 204:

> "So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER GA. CODE ANN. § 27-2534.1 (b) (2) IS UNCONSTITUTIONAL IN THAT THE SAME ALLOWS A JURY TO INFLICT THE DEATH PENALTY UNDER CIRCUMSTANCES WHERE A DEFENDANT'S CRIME DOES NOT REFLECT CONSCIOUSNESS MATERIALLY MORE DEPRAVED THAN THAT OF ANY PERSON GUILTY OF MURDER IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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The imposition of the death penalty was unauthorized for the reason Ga. Code Ann. § 27-2534.1 (b)(2), as the same relates to the offense of burglary, is unconstitutional in that same allows a jury to inflict the death penalty under circumstances where a defendant's crime does not reflect consciousness materially more depraved than that of any person guilty of murder, thus allowing a jury to act as arbitrarily and capriciously as they desire in deciding whether to impose the death penalty, in violation of the 8th and 14th Amendments to the United States Constitution.

Ga. Code Ann. § 27-2534.1 (b) (2) as it relates to burglary is as follows:

> "The offense of murder . . . was committed while the offender . . . was engaged in the commission of burglary . . . "

In the case at bar, the only statutory aggravating circumstance found by the jury to support this death sentence was that quoted above. Under the Georgia law a jury is authorized to inflict the death penalty if a murder is committed in the commission of a burglary regardless of any of the other circumstances of the case.

Gregg v. Georgia, 428 U.S. at 189:

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or

spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

We respectfully contend to authorize a jury to inflict the death penalty solely because a murder was committed in the commission of a burglary allows them to act as arbitrarily and capriciously as they desire. True, the Court must charge a jury on mitigating circumstances. In spite of this, the jury is still authorized to inflict the death sentence in such case no matter what the mitigating circumstances may be.

This proposition is quite vividly illustrated by Moore v. Balkcom, 513 F. Supp. 803 (federal habeas), wherein the defendant had been sentenced to death resulting from a situation where one was killed during the commission of a burglary. In Moore the Court wrote:

"The Court quickly determines that 'petitioner's crimes cannot be said to have reflected consciousness materially more "depraved" than that of any person guilty of murder.' 446 U.S., at 432-33. The petitioner's case is thus held to be indistinguishable from the many cases in which the death penalty was not imposed."

Thus, our death penalty statute authorized a jury to impose the death penalty in cases "indistinguishable from the many cases in which the death penalty was not imposed."

We note here that Jimmy Lee Horton's case is the only one we have been able to locate wherein the only statutory aggravating circumstance supporting the death penalty was that the murder was committed in the commission of a burglary. Neither did the Georgia Supreme Court refer to such a case in its opinion.

Furthermore, in Gregg, supra, the United States Supreme Court indicated appellate review was an important consideration in its finding that the Georgia death penalty statute was generally not unconstitutional.

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for an automatic appeal of all sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.
>
> " . . . Moreover, to guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." Gregg, p. 198.

Also, Justice White commented on the role of the Georgia Supreme Court, "Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statute, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given catagory of crime will be set aside." Gregg, p. 222.

In the instant case, the Georgia Supreme Court has failed in its statutory and constitutional duty to realistically review the imposed sentence. A reading of the five cases alleged by the Georgia Supreme Court to be similar to the instant case reveals that each of the cases involves either a pre-planned or horribly brutal murder, and a factual

situation which is much different from that in the case at hand. These cases are reviewed in Section I., Reasons For Granting The Writ herein. Additionally, the court apparently failed to consider the case of Smith v. State, 245 Ga. 168, in which a life sentence was given to the triggerman in a factually similar murder case.

The Georgia Supreme Court's failure to realistically review the sentence in the instant case shows death sentences are still imposed in Georgia with unconstitutional arbitrariness. Jimmy Lee Horton cannot be said to have reflected consciousness materially more depraved than that of any person guilty of murder.

## IV.

## THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE COURT'S CHARGE TO THE JURY ON THE SUBJECT OF MITIGATING CIRCUMSTANCES FAILED TO GUIDE AND FOCUS THE JURY'S OBJECTIVE CONSIDERATION OF THE PARTICULARIZED CIRCUMSTANCES OF THE INDIVIDUAL OFFENSE AND THE INDIVIDUAL OFFENDER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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The court's charge to the jury at the sentencing phase of the trial on the subject of mitigating circumstances was harmful error for the reason same failed to guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender, the same being in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

On the subject of mitigating circumstances, the court charged the jury as follows (T. 1112, start line 23):

> "Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame."

At T. 1114, the trial court also charged as follows:

> "Now, I charge you that the defendant contends that mitigating circumstances exist in this case. And in that connection, I charge you that in arriving at your verdict in this case you will consider evidence as to the mitigating circumstances which the defendant contends exist in this case."

The above quoted charges were the only explanations given to the jury concerning the function of mitigating circumstances as they apply to a death peanlty hearing. We

respectfully contend the court's charge to the jury fell far short of guiding and focusing the jury's consideration of the particularized circumstances of the individual offense and the individual offender as required by Lockett v. Ohio, 438 U.S. 586, Jurek v. Texas, 428 U. S. 274, Gregg v. Georgia, 428 U.S. 153 and Chenault v. Stynchcombe, 581 F. 2d 444, as explained in Spivey v. Zant, 661 F. 2d. 464.

## C O N C L U S I O N

Petitioner prays a writ issue to review the judgment of the Supreme Court of Georgia.

This 24 day of November, 1982.

Respectfully submitted,

Hugh Q. Wallace
Of Counsel for Petitioner
103 Fulton Federal Bldg.
544 Mulberry Street
Macon, Georgia 31201
(912) 742-2987

John E. Simmons
Of Counsel for Petitioner
705 Georgia Power Building
P. O. Box 214
Macon, Georgia 31202 - 0214
(912) 745-3324

CERTIFICATE OF SERVICE

This is to certify pursuant to Rule 33 of the Rules of the Supreme Court, I have served the following party to this proceeding with a complete copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia by depositing same in the United States Mail, correctly addressed with sufficient postage affixed thereto as follows:

MR. MIKE BOWERS
Attorney General for the State of Georgia
132 State Judicial Building
40 Capital Sq., S.W.
Atlanta, Georgia 30334

This 17 day of November, 1982.

Hugh Q. Wallace
Of Counsel for Petitioner
103 Fulton Federal Bldg.
544 Mulberry Street
Macon, Georgia 31201
(912)742-2987

Cite as, Ga., 295 S.E.2d 281

HORTON

v.

The STATE.

No. 38570.

Supreme Court of Georgia.

Sept. 8, 1982.

Rehearing Denied Sept. 28, 1982.

Defendant was convicted in the Superior Court, Bibb County, C. Cloud Morgan, J., of murder and two counts of burglary, and he was sentenced to death for the murder and to 20 years for each of the burglaries, and he appealed. The Supreme Court, Jordan, C. J., held that: (1) evidence was sufficient to support conviction; (2) being discovered during commission of burglary was not such provocation as would require charge on voluntary manslaughter; (3) there were no circumstances of alleviation or mitigation in State's evidence, as would make it error to charge that malice is presumed from use of deadly weapon; (4) trial court did not err in overruling defendant's motion for change of venue; (5) trial court did not err in refusing to allow argument concerning parole; (6) trial court did not err in refusing to allow defendant to describe to jury during his closing argument the mechanics of electrocution; (7) victim's status as district attorney was not considered by jury in deciding to impose death penalty for murder; (8) prosecutor's remarks, during sentencing phase, made no reference to parole and his argument concerning deterrence was not prejudicial; (9) instructions given sufficiently defined mitigating circumstances and informed jury as to function of mitigating circumstances in sentencing deliberations; (10) trial court did not abuse its discretion in denying extraordinary motion for new trial on basis of newly discovered evidence of accomplice's confession; (11) sentence of death for murder was not imposed under influence of passion, prejudice, or other arbitrary factor; (12) evidence supported jury's finding of statutory aggravating circumstance; (13) death penalty was not excessive per se for murder committed during burglary; and (14) sentence was not disproportionate or excessive.

Affirmed.

1. **Burglary** ⇐41(1)
**Homicide** ⇐250

Evidence was sufficient to support conviction of murder and two counts of burglary.

2. **Homicide** ⇐309(4)

Written request to charge voluntary manslaughter must be given if there is slight evidence to support it.

3. **Homicide** ⇐309(6)

Being discovered during commission of burglary was not such provocation as would require charge on voluntary manslaughter. Code, § 26-1102.

4. **Homicide** ⇐286(2)

There were no circumstances of alleviation or mitigation in State's evidence, as would make it error to charge that malice is presumed from use of deadly weapon, and moreover, trial court did not charge that malice could be presumed from use of deadly weapon.

5. **Criminal Law** ⇐126(2)

In prosecution which resulted in conviction of murder and two counts of burglary, trial court did not err in overruling defendant's motion for change of venue, where only two jurors were excused because they had formed opinions as to guilt or innocence from pretrial publicity.

6. **Constitutional Law** ⇐270(2)
**Criminal Law** ⇐1213

Eighth and Fourteenth Amendments require that sentencer not be precluded from considering, as mitigating factor, any aspect of defendant's character or record and any circumstance of offense that defendant proffers as basis for sentence less than death; however, that does not limit traditional authority of court to exclude, as irrelevant, evidence not bearing on defend-

ant's character, prior record or circumstances of his offense. U.S.C.A.Const.Amends. 8, 14.

**7. Criminal Law ⇐723(1)**

State is forbidden to comment with regard to defendant's inability to make parole, as well as his ability to do so. Code, § 27-2206.

**8. Criminal Law ⇐723(1)**

Since ability or inability to obtain early release did not relate to defendant's character, his prior record, or circumstances of his offense, trial court did not err in refusing to allow requested argument. Code, §§ 27-2206, 27-2511; U.S.C.A.Const.Amends. 8, 14.

**9. Criminal Law ⇐723(1)**

In prosecution which resulted in death sentence, trial court did not err in refusing to allow defendant to describe to jury during his closing argument the mechanics of electrocution. Code, § 81-1009.

**10. Criminal Law ⇐1208(1)**

As to cases in which capital punishment is possible, jury is allowed to give case individualized consideration of circumstances of crime and of defendant. Code, § 27-2534.1(b), (b)(1-10), (c).

**11. Criminal Law ⇐1208(1)**

Jury's recommendation of death penalty could not properly be based on constitutionally impermissible reasons such as race or religious preference.

**12. Homicide ⇐354**

Victim's status as district attorney was not considered by jury in deciding to impose death penalty for murder. Code, § 27-2534.1(b)(5).

**13. Criminal Law ⇐1171.1(6)**

Prosecutor's remarks, during sentencing phase, made no reference to parole and his argument concerning deterrence, which defendant contended injected facts into case not in evidence and led jury to believe sentence of death would not be carried out, was not prejudicial.

**14. Criminal Law ⇐796**

Death penalty statute does not require that specific mitigating circumstances be singled out by court in its charge to jury.

**15. Criminal Law ⇐796**

In capital case, instructions given sufficiently defined mitigating circumstances and informed jury as to function of mitigating circumstances in sentencing deliberations.

**16. Criminal Law ⇐951(5)**

Trial court did not abuse its discretion in denying extraordinary motion for new trial on basis of newly discovered evidence of accomplice's confession, since evidence supported trial court's finding that defendant, but not his attorneys, knew of "confession," if there was one, and failed to notify his attorneys even though he had ample opportunity to do so; moreover, circumstances surrounding allegedly newly discovered evidence, as well as certain testimony, cast serious doubt on credibility of proposed testimony.

**17. Homicide ⇐354**

Sentence of death for murder was not imposed under influence of passion, prejudice, or other arbitrary factor.

**18. Homicide ⇐354**

Evidence that defendant was discovered while still at scene of burglary and fired at two people in his attempt to get away, killing one, supported jury's finding of statutory aggravating circumstance that offense of murder was committed while defendant was engaged in commission of burglary. Code, § 27-2534.1(b)(2).

**19. Homicide ⇐354**

Death penalty was not excessive per se for murder committed during burglary. Code, § 27-2534.1(b)(2).

**20. Criminal Law ⇐1206(2)**

Death sentence was not disproportionate to sentence imposed on codefendant, who was sentenced to life imprisonment, where evidence showed that defendant, and not his codefendant, planned burglaries and actually killed victim, defendant was con-

victed of malice murder whereas codefendant was convicted for felony-murder and defendant's prior record was much worse than codefendant's.

21. Criminal Law ⇐1208(1)

Sentence of death will not be affirmed unless in similar cases throughout state death penalty has been imposed generally and not wantonly and freakishly; however, Supreme Court does not include for comparison purposes any case as to which death penalty was not available option.

22. Criminal Law ⇐1206(2)

Death sentence was not excessive or disproportionate to sentences generally imposed in cases in which murder occurred during commission of burglary.

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Hugh Q. Wallace, John E. Simmons, Macon, for Jimmy Lee Horton.

Joseph H. Briley, Dist. Atty., Gray, Tom Matthews, Asst. Dist. Atty., Macon, Michael J. Bowers, Atty. Gen., for the State.

JORDAN, Chief Justice.

Appellant, Jimmy Lee Horton, was convicted of murder and two counts of burglary. He was sentenced to death for the murder and to twenty years for each of the burglaries. He now appeals, raising 16 enumerations of error. We affirm.

The facts can be summarized as follows: Around 6:00 p. m. of the evening of November 28, 1980, appellant borrowed a pickup truck from a friend on the pretext of needing to move furniture. Later that evening, appellant and Fless "Chug" Brown burglarized the home of Willie James Griffin. The two took a dark-colored H & R .22 caliber pistol, some bullets, a television and a wedding band. Next, appellant and Brown forced their way into the apartment of Sherrell Grant.

Shortly after 11:00 p. m., Sherrell Grant and Don Thompson returned to her apartment. The front door was not fully closed. Ms. Grant pushed the door open and saw that several items of her furniture were missing. They listened and, hearing no noise, decided the burglars had left. As a precaution, however, they went to the apartment next door to borrow a gun, and then, while Ms. Grant waited outside, Thompson entered her apartment.

Ms. Grant noticed that a pickup was backed into a parking place at the end of the parking lot. A black male came around the corner of the apartments and went to the pickup. He was soon followed by a taller black male who, in Ms. Grant's words, "... hesitated, like he might have—was going to go back around, but he went on like he was going to walk to the truck. I told him to stop and not to go anywhere. And when I did that, he started shooting at me." Her neighbor pulled Ms. Grant into his apartment and locked the door. They heard a second volley of shots. The neighbor called the police and Ms. Grant exited the apartment to look for Thompson. The pickup was gone. Thompson was found slumped over behind the apartment building. The gun he had borrowed had not been fired; the safety was on.

Appellant, who was taller than Brown, returned the pickup to its owner to whom he admitted that he had shot a man. The pistol stolen in the first burglary was recovered from appellant's residence. This was later identified as the murder weapon. The screwdriver used to force open the door to Ms. Grant's apartment was found in appellant's car.

[1] The evidence, viewed in a light most favorable to the prosecution, was clearly sufficient to support the jury's finding of guilt as to the murder and the two burglaries. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

GUILT-INNOCENCE PHASE

In his eighth enumeration of error, appellant contends the court erred in failing to charge voluntary manslaughter upon timely request.

[2] A written request to charge voluntary manslaughter must be given if there is slight evidence to support it. *State v. Clay*,

249 Ga. 250(1), 290 S.E.2d 84 (1982). See also, *Washington v. State*, 249 Ga. 728, 292 S.E.2d 836 (1982), and *Johnson v. State*, 249 Ga. 621, 292 S.E.2d 696 (1982).

[3] In this case, we are unable to find even slight evidence that appellant acted "as the result of a sudden, violent and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person . . ." Code Ann. § 26-1102. Compare, *Krier v. State*, 249 Ga. 80, 94, 287 S.E.2d 531 (1982). Being discovered during the commission of a burglary is not as a matter of law such provocation as would require a charge on voluntary manslaughter.

2. In his ninth enumeration of error, appellant complains of the following charge: " . . . [I]f a person of sound mind and discretion intentionally and without justification uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily used and thereby causes the death of a human being, you may infer the intent to kill."

[4] Appellant contends this charge violates the rule that if the state's evidence shows mitigating circumstances, it is error to charge that malice is presumed from the use of a deadly weapon. See, e.g., *Jordan v. State*, 232 Ga. 749(5), 208 S.E.2d 840 (1974). We find no circumstances of alleviation or mitigation in the evidence presented by the state; moreover, it is clear that the trial court did not charge that malice may be presumed from the use of a deadly weapon. This enumeration of error is meritless.

[5] 3. The trial court did not err in overruling appellant's motion for change of venue. Only two jurors were excused because they had formed fixed opinions as to guilt or innocence from pre-trial publicity. Compare, *Waters v. State*, 248 Ga. 355(1), 283 S.E.2d 238 (1981).

SENTENCING PHASE

4. In his fourth enumeration of error, appellant contends the trial court erred in refusing to permit him to argue to the jury during the sentencing phase of his trial that since he was a habitual violator, he would have to serve 20 years without parole. See Code Ann. § 27-2511. Appellant argues that he was deprived of his right to present this mitigating circumstance to the jury.

[6] The "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1981) (footnotes omitted). However, nothing in *Lockett v. Ohio* "limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Ibid, fn. 12.

[7] The policy of this state is not to allow argument or charge on matters concerning parole. *McKuhen v. State*, 216 Ga. 172(5), 115 S.E.2d 330 (1960); Code Ann. § 27-2306. This policy forbids comment with regard to a defendant's *inability* to make parole, as well as his *ability* to do so. *Golden v. State*, 213 Ga. 481(3), 99 S.E.2d 882 (1957).

[8] The ability or inability to obtain early release does not relate to a defendant's character, his prior record, or the circumstances of his offense. Thus our state policy forbidding argument about such matters does not run afoul of either the Eighth or Fourteenth Amendments to the U. S. Constitution and the trial court did not err in refusing to allow the argument.

5. In his fifth enumeration of error, appellant contends the trial court erred in refusing to allow him to describe to the jury during his closing argument the mechanics of an electrocution.

[9] In *Franklin v. State*, 245 Ga. 141(7), 263 S.E.2d 666 (1980) we held that testimony regarding descriptions of executions, offered during the sentencing phase of a trial, may be excluded as irrelevant upon objec-

tion by the state. No such evidence was offered in this case and the trial court did not err in refusing to allow appellant to argue facts not in evidence. Code Ann. § 81-1009.

6. In his sixth enumeration of error, appellant contends the trial court erred in denying his written request to charge: "The fact that the victim was the District Attorney of this circuit is not to be considered by you as being in aggravation of punishment. This should play no part in your thought processes in determining the question of punishment." Appellant contends the charge was a correct statement of the law, was pertinent and material to the issues, and was not substantially covered in the charge given; therefore the failure to charge his written request was reversible error. *See Roy v. Gallant-Belk Co.*, 147 Ga.App. 580(4), 249 S.E.2d 635 (1978). We disagree.

Under our capital punishment law, injuries may not recommend the death sentence unless they find the presence of at least one of the aggravating circumstances specifically enumerated in Code Ann. § 27-2534.1(b)(1-10).[1] Code Ann. § 27-2534.1(c). In deciding whether or not to recommend the death penalty, however, the jury may consider not only the "statutory aggravating circumstances" set forth in Code Ann. § 2534.1(b)(1-10) but also any "mitigating circumstances or aggravating circumstances authorized by law." Code Ann. § 27-2534.1(b). See also *Lockett v. Ohio*, supra.

[10] Thus, capital punishment is possible only in a small number of explicitly defined subclasses of homicide cases; but as to such cases, the jury is allowed to give the case before it individualized consideration of the circumstances of the crime and of the defendant.[2] Compare *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974, and *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944.

[11, 12] There is no doubt that a jury's recommendation of the death penalty could not properly be based on constitutionally impermissible reasons, such as race or religious preference. However, whether or not the victim's status as the District Attorney properly could have been considered in aggravation,[3] it is clear that it was not.

The victim's occupation was made the subject of extensive voir dire by appellant who asked for and received assurances that the victim's job would not be considered as an aggravating circumstance. In his closing argument, appellant argued, "I go back to the fact that Don Thompson was the District Attorney. On my own, I asked everybody would that influence his verdict, and you told me no . . . I know that's not going to enter into your verdict . . ." The prosecutor also argued that the death penalty wasn't being sought because the victim was a District Attorney. Moreover, there is no indication from the evidence presented that appellant knew at the time of the murder that his victim was the District Attorney.

7. Appellant's seventh, twelfth, and thirteenth enumerations of error relate to allegedly improper argument by the prosecutor.

During the sentencing phase, evidence was offered of appellant's prior record. In December of 1970 appellant committed two burglaries. In early 1971, he stole one motor vehicle and attempted to steal another. In May 1971, appellant pled guilty to the burglaries and received six years for each, to run concurrently. In October 1971, he pled guilty to the motor vehicle thefts and

1. Except for the offenses of aircraft hijacking or treason, which do not require a finding of statutory aggravating circumstances. Code Ann. § 27-2534.1(a).

2. The jury's discretion to impose capital punishment is further limited by our review of the death penalty wherein we determine, among other things, whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. Code Ann. § 27-2537(c)(3).

3. Code Ann. § 27-2534.1(b)(5) (The murder of a district attorney during or because of the exercise of his official duty) was not charged to the jury.

received a sentence of three years,[4] to run concurrently with the burglary sentences.

In December 1975 and again in February 1976, appellant committed two more burglaries. He pled guilty to these in April 1976. He escaped from the penitentiary in August of 1976 and before his recapture, committed the offenses of theft by receiving and armed robbery. In June 1977, he pled guilty to the theft and armed robbery charges.[5] In August 1977, he pled guilty to the escape. All the sentences, except for the escape, ran concurrently with each other.[6] No sentence required appellant to serve more than six years (he was given a one year sentence for the escape).

During his argument, the prosecutor pointed out that, because of the concurrent sentencing, appellant had actually been sentenced to serve only six years for his first four offenses. He noted the comparatively light sentences received for the other crimes and argued that the "system" had been good to appellant and had given him every chance to straighten out his life. He argued that the penitentiary was not punishment for appellant, that appellant was "willing to plead guilty to anything that doesn't do anymore than send him back to the penitentiary." He argued that the death penalty was obviously a deterrent, that "[t]hose who would say the death penalty is no deterrent rely on negative statistics. They will tell you that statistics [do] not prove that the death penalty is a deterrent. Well, of course, statistics can't prove that . . . The reason our death penalty now hasn't reduced killings any is because we are not using it, not carrying out sentences. That's the reason it's not deterring it now."

[13] Appellant contends that the prosecutor made an argument concerning parole, in violation of Code Ann. § 27-2306. We find no such violation. The prosecutor's remarks made no reference to parole. The thrust of his argument was that since the sentences imposed were run concurrently, appellant had got a break he didn't deserve and that he had had his chance to be rehabilitated, but had failed to respond because he was beyond rehabilitation and did not deserve another chance. *See, Redd v. State*, 242 Ga. 876(4), 252 S.E.2d 383 (1979).

Appellant also contends that the prosecutor's argument concerning deterrence injected facts into the case not in evidence and contaminated the jury with the "Private Slovik Syndrome" by leading the jury to believe a sentence of death would not be carried out.

"Were this not a death penalty case, these [latter two] enumerations of error would present nothing for review since no objection to these remarks was made. [cits.] Because this is a death penalty case, and the allegedly improper argument occurred in the sentencing phase of the trial, we have reviewed these remarks and determined that they were not so inflammatory and prejudicial as to mandate setting aside the death penalty on the basis that it was imposed under the influence of passion, prejudice, or any other arbitrary factor. [cits]." *Gilreath v. State*, 247 Ga. 814(15), 279 S.E.2d 650 (1981).

While the prosecutor should not have referred to facts not in evidence, the fact that the death penalty has seldom actually been carried out in recent years is surely a matter of common knowledge. We do not believe that the jury was led to believe that if they recommended the death penalty, it would never be carried out. In fact, the clear implication of the argument was that it eventually would be. See also *Borden v. State*, 247 Ga. 477(4), 277 S.E.2d 9 (1981).

8. In his eleventh enumeration of error, appellant contends the court's charge on mitigating circumstances was error, citing *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981). We find no error.

4. Apparently only one three year sentence was imposed even though two charges were listed on the sentence form.

5. Additional charges of burglary and motor vehicle theft were nolle prossed, possibly in exchange for a guilty plea to the armed robbery count.

6. Either by express direction, or by operation of law. See Code Ann. § 27-2510.

The trial court defined mitigating circumstances for the jury as follows: "Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame."

The trial court instructed the jury to consider evidence as to mitigating circumstances, and made it clear to the jury that it could recommend a life sentence even if it found that the state had proven the existence of one or more aggravating circumstances beyond a reasonable doubt.

[14, 15] The Georgia death penalty statute does not require that specific mitigating circumstances be singled out by the court in its charge to the jury. *Gates v. State*, 244 Ga. 587(6), 261 S.E.2d 349 (1979). See also, *Lockett v. Ohio*, supra. The instructions given sufficiently defined mitigating circumstances and informed the jury as to the function of mitigating circumstances in the sentencing deliberations.

## EXTRAORDINARY MOTION FOR NEW TRIAL.

9. Appellant was sentenced to death February 27, 1981. He filed a motion for new trial, which was denied August 17, 1981. He then appealed to this court. However, on October 2, 1981, appellant filed in the trial court an "Unusual and Extraordinary Motion for New Trial as to Sentencing on the Basis of Newly Discovered Evidence." This court ordered that the appeal be held in abeyance pending a hearing and determination by the trial court on the extraordinary motion. On March 8, 1982, the trial court, after hearing, denied the motion. In his fifteenth enumeration of error, appellant contends the denial of his extraordinary motion for new trial as to sentencing was error.

Appellant testified at the hearing on the motion that in the latter part of July, 1981, he heard for the first time that Pless Brown might have admitted to Arthur Fryer that he, Brown, had killed Don Thompson. It is not disputed, and the trial court found as a matter of fact, that appellant's attorneys had no knowledge of Brown's alleged confession until contacted by appellant in late September, 1981.

Fryer was called and testified that Brown had admitted being the triggerman. However, Fryer also testified that he had met appellant in a cemetery three to four days after Thompson's death and had informed appellant of Brown's admission. Moreover, Fryer admitted that he had been a fugitive from justice from the time of the shooting until September, 1981, when he was caught and placed in the Bibb County jail where appellant was being held pending his appeal. He further admitted that he had known appellant for some 12 to 15 years and that he and appellant had committed a burglary together in 1976, for which they both served time. Finally, he admitted that he had refused to sign his affidavit, which was attached to appellant's extraordinary motion for new trial, until he was told by appellant's attorneys that Brown, whom Fryer also knew well, had already been sentenced to life imprisonment and was "home free."

Fryer's testimony was contradicted by Hamp Davis, who testified that Fryer had told him that the day after Thompson was killed, appellant had admitted shooting a man but didn't know who he was.

[16] The six requirements for granting a new trial on the basis of newly discovered evidence are well established and need not be repeated in full here. See *Drake v. State*, 248 Ga. 891, 894, 287 S.E.2d 180 (1982); and *Dick v. State*, 248 Ga. 898, 900, 287 S.E.2d 11 (1982). The trial court found that appellant failed to establish that the evidence had come to his knowledge since the trial, and found that it was owing to the appellant's want of due diligence that his attorneys did not acquire the evidence sooner.

The evidence supports the court's finding that appellant, but not his attorneys, knew of the "confession," if there was one, and failed to notify his attorneys even though he had ample opportunity to do so. Appel-

lant's testimony that he only learned of Brown's confession long after the trial was over was contradicted by the very witness by whom he sought to establish that such a confession was made.

Moreover, the circumstances surrounding the alleged newly discovered evidence, as well as the testimony of Hamp Davis, "cast serious doubt on the credibility" of Fryer. *Drake v. State*, supra. We conclude that the trial court did not abuse its discretion in denying appellant's extraordinary motion for new trial as to sentencing.

SENTENCE REVIEW

[17] 10. We conclude from our review of the record in this case that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor. Appellant's fourteenth enumeration of error is without merit.

11. The jury found as a statutory aggravating circumstance that "the offense of murder was committed while the offender was engaged in the commission of burglary . . ." See Code Ann. § 27-2534.1(b)(2). Appellant contends in his third enumeration of error that this finding was not supported by the evidence, because appellant had withdrawn from the burglary and was attempting to flee when the murder took place.

There is no merit to this contention. In a case involving a felony murder, we held: "A homicide is within the res gestae of the underlying felony for the purpose of the felony-murder rule if it is committed while fleeing the scene of the crime. [cit.] The weight of authority holds that the underlying felony continues during the escape phase of the felony if there is continuous pursuit immediately organized, and the felony terminates at the point the perpetrator has arrived at a place of seeming security or when the perpetrator is no longer pursued by the authorities. [cits.]" *Collier v. State*, 244 Ga. 553, 560(3), 261 S.E.2d 364 (1979).

[18] Appellant was discovered while still at the scene of the burglary. He fired at two people in his attempt to get away, killing one. We readily conclude that the murder occurred during the commission of the burglary and that the evidence supports the jury's finding of statutory aggravating circumstance (b)(2) beyond a reasonable doubt. Code Ann. § 27-2534.1(c).

12. In his sixteenth enumeration of error, appellant contends that the imposition of the death penalty for a murder occurring during the commission of a burglary is per se excessive because such a murder does not reflect a consciousness materially more depraved than that of any person guilty of murder.

In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1979), the United States Supreme Court set aside Godfrey's death sentences, which had been imposed on the basis that the murders were outrageously or wantonly vile, horrible or inhuman in that they involved torture, depravity of mind, or aggravated batteries to his victims. Code Ann. § 27-2534.1(b)(7). The jury's verdict failed to note that torture, depravity of mind or aggravated battery had been found. The Court concluded that none could have been found because it had been conceded by the prosecutor that neither torture nor aggravated battery had been involved and Godfrey's "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Id. at 455, 100 S.Ct. at 1778-79. Thus, the evidence failed to support a finding of the (b)(7) aggravating circumstance.

Nothing in Godfrey or in our death penalty statute requires that a death penalty be set aside in every case unless the defendant can be characterized as "depraved." The aggravating circumstance (b)(2) found in appellant's case does not require a finding of depravity of mind.

[19] Appellant has given us no reason to hold that the death penalty is excessive per se for a murder committed during a burglary. Compare, *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). This enumeration of error is meritless.

13. In his second enumeration of error, appellant contends his death sentence is disproportionate to the sentence imposed in a similar case, that of his co-defendant, who was sentenced to life imprisonment. Appellant argues that no distinction exists which would justify different sentences in the two cases.

We note that appellant, not Brown, fired at Sherrell Grant with a dark-colored pistol similar to the one later found in appellant's apartment which was shown to be the murder weapon.[7] Appellant borrowed the truck used in the two burglaries, owned the screwdriver which was used to pry open the door in the second burglary and sold the television taken in the first burglary. Appellant admitted to Hamp Davis (and possibly to Arthur Fryer) that he was the triggerman.

[20] The evidence shows that appellant, and not Brown, was the one who planned the burglaries and who actually killed Don Thompson. It is not insignificant that appellant was convicted of *malice* murder whereas Brown's conviction was for *felony* murder (which does not require a finding of a specific intent to kill—Code Ann. § 26-1101(b)).

Moreover, appellant's prior record, see division 7 of this opinion, is much worse than Brown's. Thus, considering both the crime and the defendant, it is obvious that there are significant differences between Brown and his crime and appellant and his crime.[8]

14. In his first enumeration of error, appellant contends his death sentence is excessive and disproportionate to the sentences generally imposed in cases similar to his. Appellant refers us to a number of cases in which a murder occurred during the commission of a burglary but the defendant was sentenced to life.

[21] We will not affirm a sentence of death unless in similar cases throughout the state the death penalty has been imposed generally and not "wantonly and freakishly." *Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829 (1975). However, since the emphasis is on what sentence triers of fact are willing to impose, we do not include for comparison purposes any case as to which the death penalty was not an available option because the case post-dated *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and pre-dated the enactment of our 1973 death penalty law.[9] Thus, we do not consider *Allen v. State*, 231 Ga. 17, 200 S.E.2d 106 (1973), one of the allegedly similar cases cited by appellant.

[22] We have reviewed all the other cases cited by appellant and all other cases appealed to this court since January 1, 1970, in which the murder occurred during the commission of a burglary. We find the following life cases to be dissimilar to appellant's case because the defendants were juveniles: *Miller v. State*, 240 Ga. 110, 239 S.E.2d 524 (1977) (16 year old defendant); *Brooks v. State*, 238 Ga. 529, 233 S.E.2d 783 (1977) (16 year old defendant); *Williams v. State*, 238 Ga. 296, 232 S.E.2d 535 (1977) (14 year old defendant); *McClendon v. State*, 237 Ga. 855, 229 S.E.2d 427 (1976) (14 year old defendant). We find other life cases cited by appellant to be dissimilar because the defendants were not the actual killers: *Smith v. State*, 245 Ga. 206, 264 S.E.2d 15 (1980); *Lane v. State*, 238 Ga. 407, 233 S.E.2d 373 (1977); *Dutton v. State*, 228 Ga. 850, 188 S.E.2d 794 (1972).

We note that appellant, after being discovered during the burglary, made no attempt to escape peacefully or to surrender, but fired first at an unarmed woman and

7. The only other pistol involved was a silver-colored one taken from Ms. Grant's apartment. She was positive that the gun appellant fired at her was not hers.

8. Even if there were none, an isolated decision of a jury to recommend mercy in a similar case would not necessarily require this court to find a sentence of death excessive or disproportionate. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975). See, however, *Ward v. State*, 239 Ga. 205(5), 236 S.E.2d 365 (1977).

9. We do compare cases as to which the death penalty could have been sought by the prosecutor but was not. Cf. *Enmund v. Florida*, ——— U.S. ———, ——— – ———, 102 S.Ct. 3368, 3375–76, 73 L.Ed.2d 1140 (1982).

thereafter at a man who, although armed, did not fire a shot.[10]

Moreover, a defendant's prospects for rehabilitation and the risk he presents to society are surely factors any sentencing authority would be entitled to consider in imposing sentence. Appellant had nine prior felony convictions, including four burglaries, an armed robbery, and an escape. By the time of sentencing, he had amassed three additional felony convictions, two for burglary and one for murder.[11]

We conclude that appellant's sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The similar cases listed in the appendix support the affirmance of the death penalty.

15. This case was tried under the Unified Appeal procedure. We have reviewed the record and find no addressable error not enumerated by appellant.

*Judgment affirmed.*

All the Justices concur.

APPENDIX.

*Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977); *Stephens v. State*, 237 Ga. 289, 227 S.E.2d 261 (1976); *Moore v. State*, 232 Ga. 861, 213 S.E.2d 829 (1975); *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 471 (1971); *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971).

10. By contrast, in *Burke v. State*, 248 Ga. 124, 281 S.E.2d 607 (1981), the victim had fired several shots at Burke before Burke returned fire.

11. Thus, *Ross v. State*, 245 Ga. 173, 263 S.E.2d 913 (1980), is distinguishable because Ross, although not a juvenile, was only 18 years old. We also note that Ross presented an alibi that was supported by testimony from his mother, brother, and sister.

INDICTMENT

STATE OF GEORGIA, BIBB COUNTY,

The Grand Jurors selected, chosen and sworn for the County of BIBB, to-wit:

1. PATRICIA BARFIELD, Foreman.
2. PAUL M. HAYES
3. ~~DELORIS I. ADKINS~~
4. ~~EDWARD PAUL HARPER~~
5. MIRIAM A. HEATH
6. ~~JACK N. HORTON~~
7. ROBERT J. HILL
8. DONNA HARDEMAN
9. CARL E. HESTER
10. DIANE W. LANGFORD
11. BEATRICE P. LOWE
12. RAY PEAVY
13. ANNIE MAUDE PETERSON
14. MAGGIE C. POLIVICK
15. ALLEN ROUNTREE
16. DALE ROSS
17. CLARENCE SALLEE
18. CARL T. SIKES
19. ROBERT L. SIMS
20. LARRY E. SMITH
21. ~~JOHN H. WESTMORELAND~~
22. KEITH STRINGFELLOW
23. JOANN WRIGHT

in the name and behalf of the citizens of Georgia, charge and accuse Jimmy Horton hereinafter referred to as the accused, of the State and County aforesaid, with the offense of MURDER

For that the said accused, on the 28th day of November in the Year Nineteen Hundred and Eighty, in the State and County aforesaid, did then and there unlawfully and with force and arms, feloniously and with malice aforethought, with a pistol which he had and held, the same being a weapon likely to produce death, make an assault upon Willard Don Thompson, and the said accused, with said weapon, did then and there unlawfully, feloniously and with malice aforethought shoot the said Willard Don Thompson, thereby giving to him mortal wounds, of which wounds the said Willard Don Thompson then and there died.

contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT #2: And the Grand Jurors aforesaid, upon their oaths aforesaid, in the name and behalf of the citizens of Georgia further charge and accuse Jimmy Horton with having committed the offense of BURGLARY; For that the said accused on the 28th day of November in the year Nineteen Hundred and Eighty, in the State and County aforesaid, did then and there unlawfully and without authority enter into the dwelling house

of Sherrell Grant, 1737 Graham Road, Raintree Apartment A-6, Bibb County, Georgia, with intent to commit a theft therein, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT #3: And the Grand Jurors aforesaid, upon their oaths aforesaid, in the name and behalf of the citizens of Georgia further charge and accuse Jimmy Horton with having committed the offense of BURGLARY; For that the said accused on the 28th day of November in the year Nineteen Hundred and Eighty, in the State and County aforesaid, did then and there unlawfully and without authority enter into the dwelling house of Willie James Griffin, 4334 Summer Hill Drive, Bibb County, Georgia, with intent to commit a theft therein,

contrary to the laws of said State, the good order, peace and dignity thereof.

BIBB Superior Court, December term, 19 80 .

Joseph H. Briley
District Attorney Pro tempore
C. W. Bishop (Special Presentment as to
Prosecutor Counts Two and Three)



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AND FURTHER the said Jimmy Horton was heretofore on October 15, 1971 convicted of the offenses of Theft of a Motor Vehicle and Criminal Attempt to Commit Theft of a Motor Vehicle, in the Superior Court of Bibb County, Georgia, under Case No. 13475, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on May 4, 1971 convicted of the offense of Burglary (2 Counts), in the Superior Court of Bibb County, Georgia, under Case No. 13270, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on April 13, 1976 convicted of the offense of Burglary, in the Superior Court of Bibb County, Georgia, under Case No. 17216, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on April 13, 1976 convicted of the offense of Burglary, in the Superior Court of Bibb County, Georgia, under Case No. 17358, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on June 28, 1977 convicted of the offense of Armed Robbery, in the Superior Court of Bibb County, Georgia, under Case No. 18501, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on June 28, 1977 convicted of the offense of Theft by Receiving Stolen Property, in the Superior Court of Bibb County, Georgia, under Case No. 18626, and was sentenced to the penitentiary.

All of the above prior convictions are incorporated by reference into Counts Two and Three of this indictment.

Jan 8 1981

Patricia S Barfield

Foreman Grand Jury Bibb

198

The Defendant Jimmy Horton being formally arraigned, pleads Not guilty, this 9th day of February, 19 81

Defendant's Attorney

District Attorney Pro tempore

Jimmy Horton
Defendant

3111

AS TO COUNT 1, WE THE JURY FIND THE DEFENDANT GUILTY OF MURDER

AS TO COUNT 2, WE THE JURY FIND THE DEFENDANT GUILTY AS CHARGED.

AS TO COUNT 3, WE THE JURY FIND THE DEFENDANT GUILTY AS CHARGED.

C. R. Cronin Foreman
C. R. CRONIN
2-27-81

FILED IN OFFICE
2nd day of March 1981
Deputy Clerk

3112

No. 21619 D-2

BIBB SUPERIOR COURT

December Term, 19 80

THE STATE

vs.

Jimmy Horton

MURDER; BURGLARY (2 COUNTS)

True Bill, This 8 Day of January, 19 81

Foreman

C. W. Bishop
(Special Presentment Prosecutor as to Counts Two and Three)

JOSEPH H. BRILEY
District Attorney Pro tempore

WITNESSES

Comm. Bishop
Wayne Arrington
Terry Singleton
Sherrell Grant

MICROFILMED
DOCUMENT CONTROL
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DESTRUCTION

Received in Open Court
at 5:10 PM Jan 8, 1981
Albert T. Byrd, Dep. Clerk

IN THE SUPERIOR COURT OF BIBB COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| STATE OF GEORGIA | : | INDICTMENT NO. 21619 |
| | : | |
| VS | : | MURDER |
| | : | |
| JIMMY HORTON | : | BURGLARY (2 counts) |

VERDICT

We the jury find the following statutory aggravating circumstance to exist in this case:

The offense of murder was committed while the offender was engaged in the commission of burglary,

and we recommend that the defendant be punished by death.

FILED IN OFFICE
Feb 27 11 a.m. 1981
Clerk Superior Court
Deputy Clerk

C. R. Cronin
Foreman
2-27-81

3113

NO. 82-5793

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JIMMY LEE HORTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF FOR THE RESPONDENT IN OPPOSITION

JANICE G. HILDENBRAND
Staff Assistant
Attorney General
Counsel-of-Record for Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3351

## QUESTIONS PRESENTED

I.

Whether the Georgia Supreme Court properly conducted its statutory sentence review as to proportionality in the present case?

II.

Whether Petitioner's counsel should have been permitted to argue to the jury during the sentencing phase that Petitioner would receive a twenty year sentence without parole on the burglary convictions as a result of being a habitual violator?

III.

Whether imposition of a death sentence under O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2) is unconstitutional because such crimes do not reflect a more depraved consciousness on the part of the offender?

IV.

Whether the trial court properly instructed the jury during the sentencing phase in regard to mitigating circumstances?

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## TABLE OF AUTHORITIES

NO. 82-5793

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF FOR THE RESPONDENT IN OPPOSITION

## PART ONE

## STATEMENT OF THE CASE

During the December, 1980 Term of the Superior Court of Bibb County, Georgia, Petitioner, Jimmy Lee Horton, was indicted for the murder of Willard Don Thompson, the burglary of Sherrell Grant's apartment and burglary of Willie James Griffin's home. The indictment alleged that Petitioner committed these offenses on November 28, 1980. Following a trial by jury, Petitioner was convicted of all offenses; a death sentence was imposed by the jury on the murder conviction and twenty year terms of imprisonment were imposed for each of the burglary convictions.

On direct appeal, the Georgia Supreme Court affirmed Petitioner's convictions and sentences as well as conducting a sentence review as mandated by Georgia statute. See Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982).

## PART TWO

## SUMMARY OF ARGUMENT

I.

Based on the opinion of the Georgia Supreme Court, it is evident that the Court correctly performed its statutory duty to review each death sentence for the possibility of excessiveness or disproportionality. The similar cases cited by the Georgia Supreme Court in its Appendix, all involved murders during the course of burglaries and had other non-statutory aggravating circumstances analogous to Petitioner's extensive criminal record.

II.

Both the trial court and the Georgia Supreme Court properly precluded Petitioner from arguing to the jury during the sentencing phase that he would receive a twenty year sentence without parole on each of his burglary convictions as a result of his status as a habitual violator under Georgia law. Such an argument is specifically prohibited by Georgia statute and does not constitute a "mitigating circumstance" as defined by this Court.

III.

Imposition of the death penalty pursuant to O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2) as it applies to the offense of murder being committed while the offender was also engaged in the commission of a burglary is constitutional. This Court has previously upheld the Georgia statutory scheme for imposition of the death penalty and, therefore, implicitly upheld burglary as an aggravating circumstance.

IV.

The trial court's charge on mitigating circumstances during the sentencing phase of Petitioner's trial was proper and fully complied with the dictates of this Court and various federal appellate decisions. The trial court fully instructed as to the meaning of mitigating circumstances and as to their function in the jury's deliberation on sentencing.

## PART THREE

## REASONS FOR NOT GRANTING THE WRIT

### I. IMPOSITION OF THE DEATH SENTENCE IN PETITIONER'S CASE IS NEITHER DISPROPORTIONATE NOR EXCESSIVE.

Petitioner contends that the facts of the present case do not reveal "enough aggravation" to warrant imposition of the death penalty. Petitioner also argues that there is no evidence presented of a depraved consciousness on the part of the offender.

The Georgia death penalty statute requires that the Georgia Supreme Court review the proportionality of death sentences to penalties imposed in similar cases:

> With regard to the sentence, the court shall determine:
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

O.C.G.A. § 17-10-35(c)(3); Ga. Code Ann. § 27-2537(c)(3).

It is apparent from the opinion of the Georgia Supreme Court in the instant case, that the state tribunal reviewed Petitioner's case in regard to both the factual background underlying the offense and Petitioner's characteristics as an individual. The Georgia Supreme Court noted that in his attempt to escape from the scene of the burglary, Petitioner attempted to kill an unarmed woman and subsequently killed her

companion. In regard to the Petitioner as an individual, the court noted that "Appellant had nine prior felony convictions, including four burglaries, an armed robbery, and an escape. By the time of sentencing, he had amassed three additional felony convictions, two for burglary and one for murder." (footnote deleted). Horton v. State, supra, 249 Ga. at 881.

Respondent maintains that the cases cited by the Georgia Supreme Court in its Appendix to the opinion, indicate substantially similar fact situations where a death penalty was imposed. Petitioner points to Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975) in which the death sentence was vacated by a federal district court. See Moore v. Zant, 513 F.Supp. 772 (S.D. Ga. 1981). The facts in Moore were unique because the death sentence was imposed by a judge who indicated on the record "that intrusion into a private home was ipso facto sufficient to demand capital punishment when the resident was killed." Id. at 815; the federal court indicated a fear that the sentence was imposed as a result of the arbitrary judgment of one individual.

The facts of the instant case are best summarized as follows: Appellant and his accomplice planned a crime for the purpose of material benefit; they carried weapons to overcome any resistance they might meet. During the commission of their crime they encountered resistance or interference; they attempted to kill both of those who sought to halt their crime; and they did actually kill one of those who interfered.

In Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977), the defendant and a friend had planned to burglarize the victims' home but were surprised when they entered the house and

subsequently murdered both the mother and daughter residents. In Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971), the death sentence was imposed on a defendant who was surprised by the residents and ultimately shot both husband and wife through the head. In Callahan v. State, 229 Ga. 737, 194 S.E.2d 431 (1971), the victim/police officer was murdered brutally when he responded to a burglar alarm.

Despite Petitioner's contentions that the "similar cases" cited by the Georgia Supreme Court in the Appendix were factually more brutal or gruesome than the facts of the instant case, he fails to take into account the non-statutory aggravating circumstances of Petitioner's extensive criminal record.

Based on the foregoing, Respondent submits that the Georgia Supreme Court adequately conducted the statutorily required sentence review.

II. PETITIONER'S STATUS AS A HABITUAL VIOLATOR, FOR PURPOSES OF HIS CONTEMPORANEOUS BURGLARY CONVICTION, WHICH REQUIRED A TWENTY YEAR SENTENCE WITHOUT PAROLE, DOES NOT CONSTITUTE A MITIGATING CIRCUMSTANCE.

Petitioner contends that he should have been allowed to argue, as a mitigating factor, that the trial court would be required to sentence him as a habitual offender to twenty years imprisonment on the burglary convictions and that there would be no possibility of parole. Petitioner argued to the trial court that he should have been allowed to make this argument without it being revealed to the jury that he could, under the earned time system, receive up to one-half off that sentence.

For several reasons, Petitioner's reasoning is unpersuasive. First, an argument as that which Petitioner proposed to make, clearly violated O.C.G.A. § 17-8-76; Ga. Code Ann. § 27-2206 which precludes mention of parole during closing argument before a jury and has been interpreted by the Georgia Supreme Court to include arguments regarding a defendant's inability to make parole. See Golden v. State, 213 Ga. 481, 99 S.E.2d 882 (1957). Second, that Petitioner would serve a term of years without the possibility of parole is not a mitigating factor.

Mitigating circumstances have been defined by this Court as "circumstances not constituting justification or excuse for the offense in question, 'but which in fairness and mercy, may be considered as extenuating or reducing the degree' of moral culpability or punishment." Coker v. Georgia, 433 U.S. 584, 590-91 (1977). And, in Lockett v. Ohio, 438 U.S. 586, 604 (1978), this Court stated "[W]e conclude that the Eighth and

Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original). In a footnote this Court added, "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at 604 n.12. Because the unavailability of parole during the instant Petitioner's burglary sentence is not an aspect of his character, record, or offense, it is not a mitigating circumstance.

Finally, Respondent would submit that any argument pertaining to the term of imprisonment to be imposed on Petitioner by the trial judge as to his burglary convictions should not be addressed to the jury while considering the sentence to be imposed on the murder conviction.

Accordingly, Respondent maintains that the trial court and the Georgia Supreme Court properly determined that Petitioner should not argue his inability to make parole on the burglary sentences to the jury during the penalty phase.

III. O.C.G.A. § 17-10-30(b)(2); GA. CODE ANN. § 27-2534.1(b)(2) IS CONSTITUTIONAL.

Petitioner contends that imposition of the death penalty pursuant to O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2) as it applies to the offense of murder being committed while the offender was also engaged in the commission of a burglary, is unconstitutional. Petitioner argues that such circumstances do not reflect a "consciousness materially more depraved" than those of the "ordinary murder."

The Georgia Supreme Court properly determined that "depravity" is not a component of the (b)(2) statutory aggravating circumstance. The discussion regarding depravity in this Court's opinion in Godfrey v. Georgia, 446 U.S. 420 (1980) pertained exclusively to the (b)(7) aggravating circumstance and this Court's concern that that provision did not provide sufficiently objective standards for the jury's consideration of the death penalty.

Of course, the jury was clearly instructed that their finding beyond a reasonable doubt the existence of the (b)(2) aggravating circumstance as it relates to burglary did not compel imposition of the death sentence. The sentencer must still "consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law," O.C.G.A. § 17-10-30 (b); Ga. Code Ann. § 27-2534.1(b), regardless of the comparative weight of the aggravating and mitigating circumstances, the setencer may extend mercy and impose a life sentence.

In addition to finding the (b)(2) aggravating circumstance, the jury was authorized to consider Petitioner's extensive criminal record as a non-statutory aggravating circumstance;

this in combination with the fact that Petitioner was unable to present any substantial mitigating factors,apparently persuaded the jury that a death sentence should be imposed.

In addition, Respondent would note that Georgia's statutory scheme for imposition of the death penalty has been held constitutional by this Court. Gregg v. Georgia, 428 U.S. 153 (1976).

Based on the foregoing, Respondent submits that O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2) is not unconstitutional either on its face or as applied in Petitioner's case.

## IV. THE TRIAL COURT PROPERLY CHARGED ON MITIGATING CIRCUMSTANCES.

Petitioner contends that the trial court's charge during the sentencing phase failed to guide and channel the jury's consideration of mitigating circumstances of the particular offense and the offender.

Regarding mitigation, the trial court charged the jury as follows:

> I charge you that in all cases for which the death penalty may be authorized, the law provides that the judge shall instruct the jury concerning mitigating circumstances or aggravating circumstances which the jury may consider in making the decisions which will determine the punishment to be imposed for this offense.
>
> Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.
>
> * * *
>
> Now, I charge you that the defendant contends that mitigating circumstances exist in this case. And in that

> connection, I charge you that in arriving at your verdict in this case you will consider evidence as to the mitigating circumstances which the defendant contends exists in this case.

(Trial transcript, pp.1112-14). The trial court also clearly instructed the jury that it could recommend mercy without any reason, even if it found one or more statutory aggravating circumstances. (Trial transcript, pp.1114-17).

Respondent submits that the above-cited charge fully comports with the guidelines established by this Court and by the federal appellate courts:

> . . . the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . ." Jurek v. Texas, 428 U.S. at 274 (96 S.Ct. at 2957). In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is[8]

and what its function is in the jury sentencing deliberations.

---

[8] The Constitution does not require the use of the words "mitigating circumstances." So long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment . . .

Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981). Respondent is aware of no requirement that the trial court enumerate factors which might be considered as mitigating in the charge.

Based on the foregoing, Petitioner's final argument presents no issue warranting review by this Court because the trial court properly instructed the jury regarding the definition and function of mitigating circumstances during the penalty phase.

## CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Jimmy Lee Horton.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Marion O. Gordon
MARION O. GORDON
First Assistant
Attorney General

William B. Hill Jr
WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Janice G. Hildenbrand
JANICE G. HILDENBRAND
Staff Assistant
Attorney General

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344

CERTIFICATE OF SERVICE

I, JANICE G. HILDENBRAND, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rule of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

Mr. Hugh Q. Wallace
Attorney for Petitioner
103 Fulton Federal Building
544 Mulberry Street
Macon, Georgia 31201

Mr. John E. Simmons
Attorney for Petitioner
705 Georgia Power Building
P. O. Box 214
Macon, Georgia 31202

This 22nd day of December, 1982.

JANICE G. HILDENBRAND
Staff Assistant Attorney General
Counsel-of-record for Respondent